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16 April 1991

ORIGINAL: ENGLISH

UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF
TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 7th MEETING

Held at the Austria Center Vienna,
on Monday, 8 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 9.45 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3)
(continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 4 (continued) (A/CONF.152/C.1/L.10)

1. Mr. SWEENEY (United States of America), introducing his delegation's proposal (A/CONF.152/C.1/L.10), explained that its purpose was to bring the provision into line with the language of other existing transport conventions. The words "if not inconsistent with the law of the country where the document is signed" appearing in the Commission's draft were, in his delegation's view, unnecessary.
2. Mr. ABASCAL (Mexico) strongly supported the proposal to delete the words "if not inconsistent with the law of the country where the document is signed", which he considered to be undesirable and indeed dangerous from the point of view of uniformity of the law. As to the rest of the paragraph, he supported the United States proposal, pointing out that it was based on the definition used in the United Nations Convention on International Bills of Exchange and International Promissory Notes of December 1989, the most recent of the United Nations Conventions in the field of international trade.
3. Mr. MORAN (Spain) and Mr. WALL (United Kingdom) also supported the proposal.
4. The CHAIRMAN said that, in the absence of any objection, he would take it that the Committee approved the United States proposal subject to such drafting changes as might be necessary in order to bring the wording completely into line with the text of the United Nations Convention on International Bills of Exchange and International Promissory Notes.
5. It was so decided.

Article 3 (continued) (A/CONF.152/C.1/L.38)

6. Mr. WALL (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.38), said that the United Kingdom was somewhat concerned by the multiplicity of operations involved in the concept of delivery of the goods into the operator's charge, particularly in the light of the wording of article 1 (a) as approved by the Committee. Under the proposal, the only two factors determining the period of responsibility were delivery of the goods and their collection. In his delegation's view, there was no need to refer to the eventuality of the goods' not being collected in time.
7. Mr. MORAN (Spain) said that the proposal was a highly interesting one and deserved to be considered in relation to other parts of the draft Convention, and particularly articles 1, 4 and 10.
8. Mr. BONELL (Italy) said that he failed to see in what respect the proposed text was clearer than the Commission's draft.
9. Mr. SWEENEY (United States of America) said that he was in favour of keeping article 3 as it stood. To include the concept of "sole" charge would be tantamount to an invitation to allocate the operator's activities, at present more or less unified, among several individual corporations, each without assets or insurance. The result would be most undesirable. The term "delivers" did not necessarily

(Mr. Sweeney, United States of America)

connote physical delivery and was not in his view preferable to the concept of "taking in charge". As for the expression "hands them over", it did, perhaps, have stronger physical connotations than the expression "placed them at the disposal", but the latter was, in his view, a sufficiently close reflection of reality. He was unable to support the United Kingdom proposal.

10. Mr. RUSTAND (Sweden) remarked that the expression "placed them at the disposal" was preferable in that it offered the operator an opportunity to divest himself of responsibility without physically handing over the goods. He could not support the United Kingdom proposal, but would support the original text, which, in his view, would have been further improved by the Finnish amendments (A/CONF.152/C.1/L.36).

11. Mr. TARKO (Austria) noted that the United Kingdom proposal made a number of changes to the wording of article 3, some of which were of a substantive nature. In his view, rather than introducing the idea of the carrier or other person delivering the goods into the operator's charge, it would be preferable to speak of the operator taking them in charge, as in article 1. He could not support the insertion of the word "sole", since it could lead to disputes: the goods, for example, might not be in the "sole" charge of the operator, yet might be in his charge all the same, and he should therefore be responsible for them.

12. On the other hand, it was accepted that the responsibility of the operator did not end completely after the period during which he had taken the goods in charge. Under article 10 (1) he still had a right of retention over them after that period, but in exercising that right he was not free to do as he liked, so that in a sense his responsibility continued. Hence there was much to be said for the proposal to omit the words "or has placed them at the disposal of", since they might create a measure of uncertainty.

13. Mr. ROJANAPHRUK (Thailand) said that the omission of the words "or has placed them at the disposal of" in the United Kingdom proposal introduced a major change in the text of article 3. Its effect would be to extend the period of responsibility of the operator, which, in his view, was not justified. He was therefore in favour of keeping article 3 as it stood.

14. Mr. ZHAO Chengbi (China) noted the efforts of the United Kingdom delegation to define more closely the period of responsibility of the operator. The terms used in its proposal, however, were not exactly in line with those used in other articles. The term "take charge" had been extensively discussed at previous meetings and, despite its uncertainty, most delegations had accepted it for want of anything better. The United Kingdom proposal involved a substantive change in that it extended the period of responsibility of the operator until the goods were actually handed over to the person entitled to take delivery. The present wording, however, allowed for the possibility that that person might be represented by an agent and for that reason had been found, after much discussion, to be satisfactory by most delegations.

15. Mr. ROMAN (Belgium) said that he could agree to the first part of the United Kingdom proposal. The second part, however, raised certain problems, in that the operator would retain full responsibility for the goods even if he was unable to get rid of them. He was therefore against the proposal as a whole.

16. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that while it was true that as legal terms "take in charge" and "hand over" might be difficult to interpret in practice, all efforts to improve on them had been fruitless, and the present proposal was no more successful. Moreover, while the term used in article 3, "takes in charge", meant that attention was focused on the operator, the United Kingdom proposal shifted the emphasis to delivery by the carrier or other person, which could well create problems. In addition, in the second part of the proposal, the goods were only to be "handed over". The omission of the concept of "placing them at the disposal of the person entitled to take delivery of them" had important practical implications. The operator might not be in a position to hand over the goods and yet ought to be able to discharge his responsibility by making them available. Despite the valid problems raised by the United Kingdom, he therefore thought it would be better to stick to the present form of words.

17. Mr. SCHROCK (Germany) said that his delegation had always felt some uneasiness regarding article 3 and the term "take in charge". In the light of comments by previous speakers, however, he considered it preferable to keep the present text as it stood.

18. Mr. WALL (United Kingdom) said that the discussion had shown there to be real problems concerning the existing text of article 3 and the difficulty of arriving at clear definitions of responsibility. As the Committee had not felt it appropriate to seek such definitions, the area covered by article 3 was bound to become a source of major problems concerning the respective responsibilities of carrier and operator. The United Kingdom was particularly concerned about the casualness of the concept of "placing at the disposal"; to use such language would be tantamount to allowing the operator to disclaim responsibility simply on the grounds that he had dumped the goods on the quayside and the person entitled to collect them had not turned up. The Convention as a whole did not necessarily confer indefinite responsibility on the operator; if the goods were not collected after a certain period of time, the operator could avail himself of other provisions of the Convention to dispose of them, but he ought to remain responsible for the goods until he had done so. His delegation remained very attached to the Finnish proposal, which, however, had been rejected, precisely because it sought to avoid the casualness of the idea of placing goods at someone's "disposal". In the circumstances it would withdraw its own proposal.

19. The CHAIRMAN accordingly took it that article 3 was approved.

20. It was so decided.

Article 1, proposals for new subparagraphs (continued)

21. Mr. WALL (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.37) said that it concerned the definition of the word "person", used in his proposals for article 3 and article 4. It might be argued that, since his proposal for article 3 had not been accepted, there was no need to define the term "person". He felt, however, it would be preferable to defer discussion until after consideration of article 4.

22. The CHAIRMAN said that document A/CONF.152/C.1/L.37 would be considered after the United Kingdom proposal concerning article 4.

Article 5 (A/CONF.152/C.1/L.11, L.12, L.20, L.24, L.39, L.42)

23. Mr. SCHROCK (Germany), introducing his delegation's proposal to add a new paragraph (1 bis) (A/CONF.152/C.1/L.11), said that after consultations with the

(Mr. Schrock, Germany)

Australian delegation, it had been decided to insert the word "unsupervised" between the words "granted" and "access". As thus revised, the proposal was now submitted jointly by Australia and Germany. It stemmed from the fact that article 5 (1) on the "basis of liability" reversed the burden of proof concerning fault and neglect. In normal circumstances it was up to the claimant to prove that the loss he had suffered had been caused by the fault or neglect of the defendant. In the present article, the burden of proof had been reversed, as it had been in other transport conventions, because when something happened to goods in a ship or railway wagon, for example, it was the carrier who knew the facts of the matter, and not the shipper, consigner or consignee. That point of view, expressed in the conventions on carriage, was one he fully supported. In the case of transport terminal operators, however, especially in major sea ports, the factual situation could be quite different, because the goods would not necessarily be stored under lock and key. Sometimes it was necessary to grant the customer access to his goods so that he could inspect them or deal with them in some other way. In big sea ports it was not possible to install electronic monitoring or supervise all customers' visits. For practical reasons, customers were sometimes given unsupervised access to goods, and if the damage occurred when a customer had been granted such access, it could equally well have been caused by the terminal operator or by the customer. In that particular situation, therefore, he suggested a return to the general rule of law whereby it was the claimant who must prove fault or neglect.

24. Mr. SMITH (Australia) said that his delegation considered that the burden of proof should not be shifted where the operator had granted the customer or other persons access to the goods in question. That would be in line with recent decisions by English courts under the common law of bailment. He had suggested the insertion of the word "unsupervised" to cover cases where the operator retained control and supervision of the goods in question, again in line with English law.

25. Mr. FILIPOVIĆ (Yugoslavia) said that while national law on the subject varied, the intention behind the draft Convention was that the operator alone should bear liability, based on fault, with reversal of the burden of proof, and he was therefore opposed to the joint proposal.

26. Mr. BONELL (Italy) said that his delegation had difficulty in supporting the joint proposal. There was sufficient room in the formula "take all necessary measures that could reasonably be required to avoid loss or damage to the goods" to enable the operator to prove that he had done what was necessary when, for example, other people were present at the place where the goods were held, in particular the customer or his agent. His delegation accordingly thought that the proposal introduced an unnecessary complication.

27. With regard to the expression "at the time of the occurrence", he thought that it would be more appropriate to refer to the entire period during which the goods were under the responsibility of the operator.

28. Mr. ROMAN (Belgium) said that he could have supported the original German proposal. Since, however, the insertion of the word "unsupervised" placed the entire burden on the operator, his delegation would abstain in the vote on the joint proposal.

29. Mrs. EL OTMANI (Morocco) said that in her country, consignees frequently visited ports and had free access to the goods. Her delegation therefore thought it should be for the consignee to prove that there had been some kind of occurrence while the goods had been in the custody of the operator.

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30. Mr. TARKO (Austria) said that article 5 (1) was quite flexible. Under the existing wording of the paragraph, it was possible for a judge to determine whether the operator had taken all the measures that could reasonably be required.

31. The expression "at the time of the occurrence" could give rise to difficulties since it might be difficult to determine when the loss, damage or delay had actually taken place. His delegation was therefore unable to accept the joint proposal.

32. Mr. RUSTAND (Sweden) said that, when the goods were inspected by the customer, it would be normal for a representative of the operator to be present to supervise matters and to protect his interests. In his view, therefore, the joint proposal was unnecessary.

33. Mr. HORNBY (Canada) said that if the customer or owner of the goods in question had been granted access to the area where the goods were stored, that would be a factor to be taken into account by the courts in determining whether or not the operator had taken all measures that could reasonably be required. His delegation could not, therefore, support the joint proposal, which would shift the burden of proof onto the claimant.

34. Mr. WALL (United Kingdom) said that, while his delegation did not oppose the proposal, it had some difficulty, for example, with regard to the word "customer". Who exactly was the customer, and what was his relationship to the operator, carrier, owner or despatcher? With respect to the expression "at the time of the occurrence", he thought that it might be more appropriate to say "during the period when the loss or damage occurred". It would be only realistic to recognize that there would probably be instances where the customer wanted to influence matters in his own interests. If the customer had an advantage in being allowed unsupervised access, he should not be able to use that advantage to the detriment of the operator. In those circumstances, the burden of proof should remain with the customer.

35. Mr. CHRISTOV (Bulgaria) said he was in favour of the proposal, since in his country's ports it was often the case that the customer did have access to the goods. He pointed out that there was a marked difference between the "Hague-Visby Rules" and the "Hamburg Rules" in that respect: in the former, the carrier, who corresponded to the terminal operator in the present case, simply had to prove that he had discharged all his responsibilities; he was not compelled to prove the occurrence of any loss or damage; in the latter, he was. Bearing in mind the actual situation that prevailed in practice, he would opt in favour of relieving the operator of the burden of proof.

36. Mr. OCHIAI (Japan) said he had some difficulties with the proposal in that it was based on the assumption that the customer and the claimant were one and the same person. If, however, they were not, and if there were no fault on the part of the claimant, he could not see why the latter should have the burden of proof imposed on him.

37. Mr. LARSEN (United States of America) said he too preferred the existing text. The proposal was introducing an evidentiary rule over and above the basic principle of liability enshrined in the Convention. In trying to deal with one specific set of circumstances, it created a shift in the burden of proof which raised as many questions as it tried to solve. In the event of an occurrence resulting in loss, the operator already had a defence, in that he could show that he had taken all reasonable care to protect the goods. He would also have a defence under article 3, in that if the customer had taken possession of the goods to inspect, treat or handle them, the operator would no longer be responsible.

38. Mrs. PIAGGI DE VANOSI (Argentina) said she too had difficulties with the proposal; in practice, it might be difficult to prove that the customer, or persons acting on his behalf, had been granted access to the area concerned at the time the loss or damage had actually occurred.

39. Mr. SCHROCK (Germany) said the joint proposal was not intended to cover some hypothetical situation, but the real situation currently existing in transport terminals, as reported by the industry and as confirmed by himself through personal visits. He could accept the United Kingdom suggestion that the phrase "during the period when the loss or damage occurred" should be substituted for the word "occurrence" in the first line of the proposal.

40. Ms. SISULA-TULOKAS (Finland) believed the situation was already taken care of in paragraph (1) of the article by the phrase "all measures that could reasonably be required". If the proposal were accepted, it would be very unwise for the customer to ask to inspect the goods; on the contrary, it would be wise for him to make clear that he did not wish to have any access to them at all.

41. Mr. BELLO (Philippines) said that while he understood the concern of the sponsors of the proposal about unsupervised access by customers, it should be remembered that such access, although unsupervised, would have been granted by the operator, so that the customer would not be an interloper or trespasser. A shift in the burden of proof could not be made on the basis of mere speculation that there was a causal link between unsupervised access and the occurrence that had caused damage.

42. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said he preferred the existing text. In the event of such an occurrence, it should be for the operator to adduce the necessary evidence to show that he was not to blame for the damage that had been done.

43. Mr. MUTZ (Observer, Central Office for International Railway Transport) said he shared the doubts expressed as to whether the provision could be applied in practice, since normally access would be supervised. Determining whether or not access had been supervised would usually amount to the same thing as determining whether or not all reasonable precautions had been taken to protect the goods.

44. The CHAIRMAN invited the Committee to vote on the joint proposal (A/CONF.152/C.1/L.11).

45. The proposal was rejected by 27 votes to 4, with 4 abstentions.

46. The CHAIRMAN suggested that a further proposal relating to article 5, submitted by Spain (A/CONF.152/C.1/L.20), which concerned a drafting point, could be transmitted to the Drafting Committee.

47. It was so agreed.

48. Mr. SOLIMAN (Egypt) introduced his proposal relating to article 5 (2) (A/CONF.152/C.1/L.42). In practice it might be difficult to prove how far the loss sustained was or was not attributable to failure on the part of the operator.

49. Mrs. EL OTMANI (Morocco) supported that proposal. It was likely to be difficult to prove anything so essentially uncertain as to the extent to which loss or damage was attributable to this or that cause.

50. Mr. BONELL (Italy) said some misunderstanding might have arisen owing to the fact that paragraph (2) was worded in a somewhat negative way. In fact, what was at stake was not a negative factor, but a positive factor, namely, the amount of loss attributable to one cause as distinct from another. Under the principle of contributory negligence, the operator's liability would be limited to the loss or damage he had in fact caused.
51. Mr. FILIPOVIĆ (Yugoslavia) shared that view. Although the concluding phrase of paragraph (2) was negative in tone, in fact it would be for the operator to prove his own part in the causation of the matter, and thus the proof required would be positive rather than negative.
52. Mr. OCHIAI (Japan) said he had some difficulties with the proposal. Since the wording used in the concluding phrase of the paragraph in the Commission's text was the same as that used in paragraph 7 of article 5 of the Hamburg Rules, as well as in article 17 of the Multimodal Transport Convention, he would prefer to see it kept.
53. The CHAIRMAN invited the Committee to vote on the Egyptian proposal (A/CONF.152/C.1/L.42).
54. The proposal was rejected by 20 votes to 7, with 7 abstentions.
55. Miss VAN DER HORST (Netherlands), introducing her delegation's proposal to add a new paragraph to article 5 (A/CONF.152/C.1/L.24), said that at the moment the draft Convention contained no specific provisions as to consequential damages. The UNCITRAL Working Group, in the preparatory discussions, had concluded that it would be for national law to determine whether the operator should be made liable for such damages, a conclusion which could mean that operators were liable in one State, but not in another. Now that an attempt was being made to unify the rules on operator liability, it would perhaps be advisable to include a provision in the Convention making it clear that consequential damages could not be recovered.
56. Ms. JØRGENSEN (Denmark) supported the Netherlands proposal, but would prefer it to be incorporated into article 6.
57. Mr. RUSTAND (Sweden) drew attention to his Government's comment (A/CONF.152/7/Add.1, p. 12) that it was not clear whether the word "loss" in paragraph (1) was to be taken as including consequential loss, and that as a result the extent of the operator's liability was uncertain. In principle, his delegation supported the proposal, although it doubted that any firm conclusion could be reached at such a late stage. For the present, it wished to reserve its position.
58. Mr. LARSEN (United States of America) shared that view. The point had already been sufficiently debated in the Working Group, where the point had been clarified, and the addition proposed by the Netherlands was unnecessary.
59. Mr. ABASCAL (Mexico) said that while he could agree to the principle that article 5 should cover consequential damages, he believed that the addition proposed by the Netherlands would be unduly restrictive in regard to the limits provided for under article 6. Accordingly, he could not support the proposal.
60. Miss VAN DER HORST (Netherlands) said the position was somewhat confused. Some delegations appeared to be in favour of making the operator liable for consequential damages, and others did not. It would perhaps be best to let the matter be decided by national authorities. She would therefore withdraw her delegation's proposal.

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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF
TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 8th MEETING

Held at the Austria Center Vienna,
on Monday, 8 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability
of Operators of Transport Terminals in International Trade (continued)

Article 5 (continued)
Article 6

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The meeting was called to order at 2.45 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 5 (continued) (A/CONF.152/C.1/L.39)

1. Mr. ROMAN (Belgium), introducing the proposal in document A/CONF.152/C.1/L.39, said that the additional paragraph would help to balance the rights and the duties of the operator by exonerating him from liability for loss or damage to the goods following the customer's failure to take delivery of the goods.
2. Mrs. EL OTMANI (Morocco), supporting the proposal, said that there was a link between the fact of goods being left in the operator's hands and the period of his responsibility. It was already established that in practice the operator's responsibility would cease once the goods were placed at the customer's disposal.
3. Ms. SISULA-TULOKAS (Finland) said she was sympathetic to the idea embodied in the proposal but thought it pertained to article 3 rather than article 5.
4. Mr. BELLO (Philippines) said that he could support the proposal if the words "within a reasonable period" were replaced by a specific time-limit, such as five days. A time-limit should also be laid down in paragraph 3 of article 5.
5. Mr. ROJANAPHRUK (Thailand) said that the point raised in the Belgian proposal was adequately covered in article 3; there was no need for an additional paragraph on the matter in article 5.
6. Ms. JØRGENSEN (Denmark) said that the proposal did not affect the operator's liability as such. It was concerned with the period of the operator's responsibility under article 3 and added nothing except a requirement for the operator to notify the person entitled to take delivery of the goods. She did not favour any such addition, either to article 5 or to article 3.
7. Mr. TARKO (Austria) agreed. The point at issue was already covered by article 3. Furthermore, he questioned the repeated use of the word "delivery" in respect of the goods. The operator was not a carrier; he simply placed the goods at the disposal of the customer.
8. Mr. ILLESCAS (Spain) agreed that the draft must strike an appropriate balance between the rights and the duties of the operator; however, the point raised in the Belgian proposal appeared to be covered by article 3. Moreover article 10 (3), by enabling the operator to sell the goods if they were not collected, provided him with a means of curtailing the period for which he remained responsible for them. Thus his liability in the case contemplated by the Belgian proposal was already limited. His delegation would be reluctant to approve the Belgian proposal if the operator was thought to be sufficiently protected by articles 3 and 10.
9. Mr. LARSEN (United States of America) agreed. He too felt that the issue raised in the Belgian proposal pertained to article 10 rather than article 5. His own delegation had submitted a proposal for article 10 (A/CONF.152/C.1/L.15) whereby the goods would be treated as abandoned if unclaimed within a specified period of time. The problem of the operator's liability in such cases should be resolved in article 10 rather than in articles 3 or 5.

10. Mr. RUSTAND (Sweden) said that the point at issue was not the basis of the operator's liability but the period of his responsibility for the goods. The period of responsibility would be rendered more, not less, uncertain by the words "a reasonable period" which appeared in the Belgian proposal.

11. Mr. GOKKAYA (Turkey) supported the proposal. The operator must not be forced to assume responsibility for the goods for an indefinite period. Since interpretations of the term "reasonable period" were bound to differ, he suggested replacing it by a fixed time-limit of 30 days.

12. Mr. NAOR (Israel) thought the Belgian proposal was redundant. Its only effect would be to extend the period of the operator's responsibility slightly beyond the period provided in article 3.

13. Mr. CHRISTOV (Bulgaria) said he could support the Belgian proposal with the amendment suggested by the representative of Turkey.

14. Mr. WANG Yangyang (China) said that the addition of a provision in article 5 to protect the operator, along the lines proposed by Belgium, would be justified. However, the proposal failed to specify a time-limit for the operator to notify the customer that the goods were available for collection.

15. Mr. ROMAN (Belgium) noted that considerable support had been expressed for his delegation's proposal, but there was also a widely-held view that article 5 was the wrong place for it. The Committee could perhaps deal with the point under article 10.

16. The CHAIRMAN observed that the reasonable period of notice contemplated in article 10 referred to the exercise of the operator's right of retention, not to his responsibility for the goods. A separate decision must be made on each question. The effect of the Belgian proposal would be to establish that the operator's responsibility for the goods lasted for a "reasonable period" after notification had been given that they were available for collection, and ceased when that reasonable period expired. A formal decision was required on that principle.

17. Mr. RUSTAND (Sweden) said that if the principle underlying the proposal was accepted and the wording of the proposal improved, its best place might be in article 3.

18. Mr. BONELL (Italy) pointed out that article 3 had been approved by the Committee and could not be amended. As to article 10, there was no apparent link between the United States proposal for that article and the Belgian proposal for article 5.

19. Mr. LEBEDEV (Union of Soviet Socialist Republics) wished it to be made clear whether the Belgian proposal would extend the period of the operator's responsibility beyond the period envisaged in article 3.

20. Mr. ROMAN (Belgium) said that the proposal would exonerate the operator from liability for loss or damage to the goods when a reasonable period after the goods had been placed at the disposal of the customer had expired.

21. The CHAIRMAN invited the Committee to vote on the Belgian proposal (A/CONF.152/C.1/L.39).

22. The proposal was rejected by 17 votes to 13, with 4 abstentions.

23. Mrs. EL OTMANI (Morocco) said that the term "failure" was used in article 5 (2), whereas in the corresponding provisions of the Hamburg Rules the expression used was "fault or neglect". She would prefer the new Convention to employ the terminology of the Hamburg Rules, since the functions of a port operator supplemented those of the maritime carrier. In Moroccan law the term "failure" implied a very broad degree of responsibility and would be interpreted as making port operators liable for the slightest failure of any sort, whereas "fault or neglect" would mean that the port operator had omitted to perform a particular act. The present difference in terminology between the Convention and the Hamburg Rules would have very harmful implications for the operator.

24. The CHAIRMAN said that in the context of article 5 (2) the term "fault" would carry a moral connotation which was inappropriate. The word "failure" did not attribute blame and indicated merely that the operator's responsibility was not properly discharged.

25. Mr. BONELL (Italy) said that the term "failure" constituted a departure from both the UNIDROIT draft and the Hamburg Rules. "Fault" would be a more appropriate term than "failure". Failure to perform a certain act implied that there was no need to inquire into the conduct of the defaulting party, whereas a stipulation of fault placed the burden of proof on that party. The term "fault" should always be used where negligence was implied, as in article 5 (1). His preference would therefore be for the words "fault or neglect" to replace the word "failure" in article 5 (2).

26. Mr. SWEENEY (United States of America) agreed. The term "failure" denoted a contractual element; however, the basis of article 5 was not simply contractual since it involved elements of both delict and tort. From that point of view "fault" was a more appropriate term. For the sake of conformity with the Hamburg Rules, it should replace the term "failure".

27. Mr. PAMBOU-TCHIVOUNDA (Gabon) said that his delegation was in favour of using the terminology of the Hamburg Rules since it was an accepted part of international trade law.

28. Mr. ILLESCAS (Spain) said that his delegation was in favour of the text as it stood: paragraph 2 of article 5 described quite clearly the sort of failure which would determine the operator's liability, namely, his failure to carry out the measures described in paragraph 1. In that context the use of the word "fault" could be misleading.

29. Mr. WEISER (International Union of Marine Insurance), speaking at the invitation of the Chairman, pointed out that article 17 of the United Nations Convention on International Multimodal Transport of Goods (the Multimodal Convention) used the same terminology as the Hamburg Rules. It would be detrimental to all three conventions if the present one, which was designed to fill the gaps between the other two, introduced new terminology.

30. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that his delegation preferred the expression "fault or neglect" because it considered it more precise.

31. Mr. WANG Yangyang (China) said that his delegation wished to retain the term "failure". The translation into Chinese of the word "failure" was very different from that of "fault": failure meant omitting something, whereas fault related to wrongdoing. The problem should be referred to the Drafting Committee and not be determined by a vote.

32. Mr. ILYTCHEV (Union of Soviet Socialist Republics) said that the word "failure", meaning omission of the necessary measures, was more universal in scope than the word "fault". His delegation therefore preferred the text drafted by the Commission.
33. Mr. RAO (India) said that his delegation had no strong views about either word but basically preferred the text as it stood. The operator's duty under paragraph 1 of article 5 was to take all measures that could reasonably be taken to avoid the prejudicial occurrence and its consequences. The manner in which the article dealt with failure in that duty was merely descriptive. Instead, therefore, of trying to particularize the notion of failure the Committee should simply allow it to stand in article 5. In practice the courts would interpret it in a liberal manner, which would necessarily involve consideration of the notion of fault or neglect.
34. Mr. FILIPOVIĆ (Yugoslavia) said that, as he saw it, the word "failure" meant insufficiency as measured by certain legal standards, which could mean fault or neglect. The two terms therefore amounted to the same thing, although the word "failure" as used in paragraph 2 might be broader and therefore more suitable.
35. Mrs. PIAGGI DE VANOSI (Argentina) reminded the Committee that when the subject had been discussed at the twenty-second session of the Commission it had been concluded that failure was not the same as fault or neglect.
36. Mr. MARSHALL (United Kingdom) said that the word "failure" in paragraph 2 served purely to apply the proportionality criterion set out in that paragraph to any liability that might arise under paragraph 1. The use of the word "failure" ensured a much more complete application of that criterion than the expression "fault or neglect".
37. The CHAIRMAN observed that the Committee seemed highly divided on a subject which was not normally one on which a vote would be taken. He therefore suggested that the Drafting Committee be invited to take up the point.
38. Mr. BONELL (Italy) said that he did not consider the question to be a matter of overwhelming importance but it might perhaps be more than just a drafting issue.
39. The CHAIRMAN asked whether there were any delegations for whom the present wording was unacceptable.
40. Mrs. EL OTMANI (Morocco) reiterated her delegation's objection to the use of the term "failure".
41. Mr. PAMBOU-TCHIVOUNDA (Gabon) shared the objections to the term "failure" voiced by the representative of Morocco. However, the choice of expression would depend on whether the system of liability to which the new Convention referred was based on risk, in which case "failure" might be more appropriate, or on fault. The use of the expression "failure" would, as the representative of Morocco had stated, create unnecessary difficulties for the operator in that any shortcomings on his part would have to be defended. That would raise particular problems in the developing countries. In drafting legislation, efforts should be made to avoid regional subjectivity and employ objective considerations based on common sense that would be acceptable to all.
42. Mr. ABASCAL (Mexico) drew the Committee's attention to article 14 of the draft Convention, which emphasized its international character and the need to promote uniformity in its application. That would rule out any interpretation based on national legal systems. In article 5, "failure" meant failure to take the specific measures defined in paragraph 1. The text as it stood was therefore better.

43. The CHAIRMAN agreed that the expression "failure" was clearly to be interpreted in relation to the Convention as a whole and not to any meaning that it might have in a specific legal system. He had heard only two delegations which had been emphatic in their opposition to the use of the word "failure". Unless, therefore, he heard any further objection, he would take it that the Committee approved the text of article 5 as it stood, for referral to the Drafting Committee.

44. It was so decided.

45. Mr. FALVEY (United States of America) said that he wished to share with the Committee his delegation's interpretation of the approved text of article 5. Concern had been expressed by operators in the United States and elsewhere that a strike by their employees might be deemed a cause of damage or delay under the Convention. The approved text would provide the operator with a defence in the event of a strike, should he have taken all appropriate action permitted under local law to deal with a strike situation, which might include bona fide negotiations; if he had taken such action he would not be held liable for the loss or damage occasioned by a strike on the part of his employees, ex-employees or agents' employees.

The meeting was suspended at 4.05 p.m. and resumed at 4.40 p.m.

Article 6 (A/CONF.152/C.1/L.12, L.27, L.45, L.51)

46. Mr. OCHIAI (Japan) introduced his delegation's proposal for the addition of a new paragraph (1) (c) to article 6 (A/CONF.152/C.1/L.27). The text was inspired by the second sentence of article 22 (2) (b) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention) as amended by the Hague Protocol of 1955. Its purpose was to provide for situations in which partial loss or damage could affect the whole of a consignment - when, for example, a piece of machinery was shipped in two packages, one of which was lost or damaged.

47. Mr. ILLESCAS (Spain) endorsed the proposal as a useful stipulation.

48. Ms. JØRGENSEN (Denmark) also approved the proposal, which reflected her country's understanding of the issue.

49. Mr. CHRISTOV (Bulgaria) considered the Japanese proposal to be just, but also superfluous in so far as its principles merely echoed the general principles of civil liability.

50. Mr. BELLO (Philippines) said his delegation could accept the proposal if it was approved on the understanding that it would be articulated with the proposal submitted by Germany in document A/CONF.152/C.1/L.12, which sought to add to article 6 (1) the notion of units of account per package or other shipping unit.

51. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) joined in approving the Japanese proposal.

52. The Japanese amendment to article 6 (1) was adopted by 12 votes to 7, with 15 abstentions.

53. Mr. LEBEDEV (Union of Soviet Socialist Republics) observed that the number of abstentions might imply that insufficient time had been devoted to consideration of the Japanese proposal. He took it that the Committee had approved the idea it

(Mr. Lebedev, Union of Soviet Socialist Republics)

embodied but might wish to reflect a little further on its formulation. In particular, thought might be given to the question of identifying accurately the goods described as those whose value was affected, and indeed to all the implications of that phrase.

54. The CHAIRMAN said that the Drafting Committee might consider the most suitable point at which to insert the Japanese proposal in the draft Convention, and might seek some improvement in the wording. The text was intended to provide guidance to courts in determining the limit of the operator's liability. Since it was derived from the Warsaw Convention as amended by the Hague Protocol - which had already served as the basis for at least one lengthy ruling in law - it would be wise to approach with caution any suggestion for altering the language which the Committee had just approved, and to align it as closely as possible with that of the instrument from which it was derived.

55. Mr. SCHROCK (Germany) introduced paragraph 1 of his delegation's proposal in document A/CONF.152/C.1/L.12, calling for the deletion of subparagraph (b) of article 6 (1). The rationale for that amendment had been set out in detail in paragraph 5 of his delegation's comments on the Commission's draft (A/CONF.152/7), which he read out to the Committee. In proposing the deletion of subparagraph (b), the German delegation was conscious that the decision whether or not to retain it was quite closely related to whatever limits of liability were to be adopted by the Conference: the position of a number of delegations, including possibly his own, with regard to article 6 (1) (a) and 6 (1) (b) would undoubtedly be influenced by agreement on relatively high or relatively low amounts. For its part, his delegation believed that the higher those amounts might be, the less would be the reason for retaining subparagraph (b).

56. The CHAIRMAN pointed out that the effect of the German proposal would be to reintroduce the notion of a single limit of liability, regardless of the mode of transport involved; that notion had been discussed at an early stage of the Commission's deliberations and subsequently set aside in accordance with the prevailing view that the dual-limit approach was preferable. He suggested that the Committee's work would be expedited if members first pronounced on those two options before examining the article further.

57. Mr. CHRISTOV (Bulgaria), after alluding to the relationship between the draft Convention and the equivalent provisions of the Hamburg Rules, and to the distribution of liabilities between the operator and his customer, said that his delegation would not object to a single limit if it corresponded to paragraph (1) (b) of the Commission's draft. On the other hand, it could see the merits of - and tended to favour - the dual-limit approach in the form in which the Commission had proposed it.

58. Ms. JØRGENSEN (Denmark) supported the German proposal. Her delegation favoured a single limit of liability at least as high as that proposed in paragraph 1 (a).

59. Mr. BONELL (Italy) said that it was difficult to express a view on a single aspect of the question of limits of liability without knowing how its other aspects would be settled. In the case of the choice between a single and a dual system, it was hard to reach a definite decision without knowing what figure would be set. For the time being, he would express a preference for a higher limit than that provided for in paragraph 1 (b), possibly as high as that set in paragraph 1 (a). The more the Convention departed from the limit set in 1978, when economic conditions had

(Mr. Bonelli, Italy)

been very different, the more he would favour a single-limit approach. However, as long as the precise figure was not known, he could do no more than express a preference. The best way of proceeding might be to get the feeling of the Conference and proceed step by step, on the understanding that the possibility should be considered of revising a preliminary decision on the matter if it proved necessary.

60. Mr. TARKO (Austria) said that his delegation supported the German proposal for a single limit of liability. It was also in favour of a limit at least as great as the 8.33 units of account mentioned in paragraph 1 (a).

61. Mr. MARSHALL (United Kingdom) agreed that there was considerable logic in having a single limit. The Committee was, after all, considering the case of one operator and his ability to react to losses when they occurred and to compensate those losses. However, that must be put in the context of the difference between the two levels of liability provided for in the Multimodal Convention and the differences among the limits provided for in the various unimodal transport conventions. It was not only the value of the goods carried which determined the carrier's liability or, in the case of the present Convention, that of the operator, but also the ability of the operator or carrier to find suitable insurance coverage if he was to be able to pay compensation when he was liable. In the case of road transport, for example, if only a single truck was involved, the concentration of loss was not large; it would be possible to compensate for the loss even if there were very high value goods inside the truck. On the other hand, the limit of liability for transit by sea was much lower, as it must be considering the size of the vessel and the enormous concentration of values. The sea carrier found it difficult and expensive to insure himself for a suitable amount to afford him protection and that was why a lower level of limit of liability had been set in the Hamburg Rules.

62. In the case of the operator of a transport terminal, it should be remembered that, if he was to be exposed to a single limit or even to two limits, what was involved was a port area which might have goods in it whose value was many times greater than that of the goods in a single vessel. Thus, if the Committee were to move to a single and higher limit, it would find that, apart from the lack of comparability between the various transport conventions, the operator would have to protect himself to a far greater extent. In many cases, where the capacity of the insurance market was limited, the operator might have difficulty in finding an insurer and might indeed have to operate uninsured. He was sure that many countries, both developed and developing, that had large State-run terminals would be unhappy with the present Convention if it stipulated such high limits that the operator's liabilities would be enormous in the event of a catastrophe.

63. Mrs. EL OTMANI (Morocco) said that she agreed entirely with the previous speaker and favoured the dual system proposed in the draft Convention. She pointed out that under paragraph 1 (b) an operator receiving goods immediately after their carriage by sea was already being asked to bear a liability greater than that stipulated for the sea carrier in the Hamburg Rules. It would have been preferable to align the limits.

64. Mr. LARSEN (United States of America) said that his delegation believed that the Convention should, to the extent possible, make the terminal operator's liability uniform with the limit of liability for the mode of transport used to carry the goods. There should therefore be a dual system. If carriage was principally by sea, the limit should be generally uniform with that applicable to

(Mr. Larsen, United States of America)

sea transport. If carriage was principally by land, the limit that applied to the land portion of the journey should prevail. The choice would be made by the shipper; if he sent goods by sea, which was the cheaper means, he faced the possibility of greater risk. He would have to take care of that risk himself, however, since the carrier would bear a lower level of liability. In the case of surface or air transport, a higher level of liability would apply. But the Committee must also consider the effect of inflation since 1980, when the limits set in the Multimodal Convention had been determined. According to statistics provided by the International Monetary Fund, the amounts set had lost about one third of their value. Accordingly, his delegation supported setting dual limits of liability but wished those limits to be updated to take account of their erosion by inflation.

65. Mr. RUSTAND (Sweden) associated himself with the views expressed in favour of providing for a dual system in the draft Convention. It was true, as the representative of Germany had pointed out, that goods sent by sea could be of great value but they were normally less valuable than those transported by other means. His delegation was therefore in favour of retaining the dual system.

66. Mr. HORNEY (Canada) also advocated the inclusion of the dual system in the draft. He believed that the guiding principle should be that the operator of a transport terminal should be subject to no less favourable limits of liability than those applicable to the carrier. That might be difficult to ensure in cases in which there was a lack of uniformity between the provisions applicable, but observance of the principle could be better achieved by a dual system such as that contemplated in the Commission's text.

67. Mr. ZHAO Chengbi (China) also thought that a dual system would be fairer. Under existing unimodal conventions, air and sea transport had very different limits of liability. Combining the different limits and asking all countries to recognize them would create difficult problems.

68. Mr. WEISER (International Union of Marine Insurance), speaking at the invitation of the Chairman, said that he too favoured a dual system, as contemplated in the Multimodal Convention. He believed that not only the value but the amount of cargo carried by a vessel had influenced the decision to institute a dual system in that Convention. Insurance cover would be needed; if the draft Convention provided for a single system the insurance would be very expensive and problems of market capacity would arise, especially in developing countries.

69. Mr. MUTZ (Observer, Intergovernmental Organization for International Carriage by Rail) said that he was aware of the political nature of the question under discussion and that in such a case the views of an observer might not carry the same weight as they would in technical matters. He also knew that the share of rail transport in international trade was much lower than that of sea carriage. He noted, however, that railways were both operators of transport terminals and clients of such terminals. He believed that a liability system which differentiated between modes of transport would, in practice, complicate the situation. The lower liability in the case of goods to be handed over by the operator for carriage by sea might give rise to litigation. In 1956, when the Convention on the Contract for the International Carriage of Goods by Road (CMR) had been adopted, a limit of liability had been set of 25 gold francs - currently 8.33 units of account per kilogram - and was still in force. At that time the limit for transport by rail was four times as large, namely 100 gold francs, but in 1970 it had been reduced by half to the present limit. It was perhaps not always desirable to start from too low a point

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(Mr. Mutz, Observer, Intergovernmental Organization
for International Carriage by Rail)

and it would not be advisable for the limit of liability to develop in that direction. However, while it could be argued that the value of goods was higher in one form of transport than another, it was undeniable that for all modes of transport the value of all goods carried had increased a great deal in the last decade and would go on doing so.

70. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that one factor which had been taken into account in drafting article 6 had been the need to make the present Convention attractive to the operators of transport terminals by setting them a reasonable limit of liability. Justified fears had been expressed that setting a high limit might result in major operators in various countries, developed and developing alike, being unwilling to support the adoption of the Convention. At the same time, the need to relate limits of liability to the basic forms of transport had also been taken into account. Although it was undoubtedly easy to establish a system of limits for carriers in specific modes of transport, the dual system devised to limit the liability of operators of transport terminals was the most rational in the circumstances. The German proposal was not without merit, but in the last analysis it would be better to keep the system proposed in the draft Convention.

71. The CHAIRMAN said that, if the Committee adopted the proposal by Germany to delete subparagraph (b) of article 6 (1), it would be opting for a single system of limits of liability; if it rejected the German proposal, it would be approving the dual system contemplated in the Commission's draft. He invited the Committee to vote on that part of the German proposal in document A/CONF.152/C.1/L.12.

72. The proposal by Germany in paragraph 1 of document A/CONF.152/C.1/L.12 was rejected by 27 votes to 4, with 4 abstentions.

The meeting rose at 5.40 p.m.

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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF
TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 9th MEETING

Held at the Austria Center Vienna,
on Tuesday, 9 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

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of Operators of Transport Terminals in International Trade (continued)

Article 6 (continued)

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Any corrections to these records will be consolidated in a single corrigendum, to be issued shortly after the end of the Conference.

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The meeting was called to order at 9.40 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3)
(continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 6 (continued) (A/CONF.152/C.1/L.45, L.51)

1. The CHAIRMAN reminded the Committee that at the previous meeting it had decided to retain the dual system of limits of liability set out in article 6 (1) (a) and (b). It now had to decide whether to approve the amounts of units of account at present enclosed in square brackets in those two subparagraphs. The first figure, 8.33 units of account, was derived from the CMR Convention, while the second, 2.75 units of account, was derived from the Multimodal Convention of 1980.
2. Mr. ROMAN (Belgium) supported the views that had been expressed at the previous meeting by the representatives of Morocco and the United Kingdom. The limit of the operator's liability should never be higher than that of the carrier's; the limit should also be related to the mode of carriage that had been chosen.
3. The CHAIRMAN invited the Committee to vote on the proposal by Morocco (A/CONF.152/C.1/L.51) that the figure "2.75" in article 6 (1) (b) should be reduced to "2.5".
4. The proposal was rejected by 13 votes to 8, with 4 abstentions.
5. Mr. HORNBY (Canada), speaking in explanation of his delegation's vote, said he had voted in favour of the proposal because he believed that the limits applicable to operators of sea terminals were most likely to become widely accepted. The lower limits proposed by Morocco were those contained in the Hamburg Rules, which, once they had entered into force, would gain wide acceptance.
6. The CHAIRMAN reminded the Committee that the previous day oral proposals had been made by the delegations of Denmark and Germany in favour of higher limits than those given in the text. He suggested that the Committee should vote on those proposals.
7. Mr. LARSEN (United States of America) asked whether a vote for higher limits would be a vote for a real increase in the limits, or simply a vote for an increase to take account of inflation.
8. The CHAIRMAN said the issue to be voted on was whether or not the figures appearing in article 6 (1) (a) and (b) should be increased. If the majority favoured such an increase, a working group might perhaps be set up to determine what the new limits should be.
9. Mr. BONELL (Italy) thought that the Committee should not be asked to decide at the present stage whether the limits should be increased; rather, it should be asked to decide whether the figures given should be adjusted to take account of inflation.
10. Mr. LAVIÑA (Philippines) shared that view.
11. Mr. LARSEN (United States of America) said the problem was that while the Committee had just voted against lowering the limits, a vote in favour of keeping

(Mr. Larsen, United States of America)

the existing figures would amount in effect to a vote in favour of lowered limits. He agreed with the Italian representative that the issue the Committee should in fact be voting on was whether to keep the existing limits, adjusted for inflation: so adjusted, the figures would be approximately 11.5 units of account for land transport and 3.15 units of account for sea transport.

12. Ms. JØRGENSEN (Denmark) explained that when she had earlier expressed a preference for a higher limit, that had been in the context of a single, unified system of limitation for all forms of transport. While the dual system was still in force, she would prefer to keep the existing limits.

13. Mr. FRANCONI (Instituto Argentino Uruguayo de Derecho Comercial), speaking at the invitation of the Chairman, pointed out that any increase in limits would immediately be followed by corresponding measures on the part of the companies concerned, notably with regard to insurance, measures which would be reflected in increased charges.

14. The CHAIRMAN invited the Committee to vote on the proposal to increase the figures quoted in article 6 (1) (a) and (b).

15. The proposal was rejected by 19 votes to 8, with 4 abstentions.

16. Mr. LAVIÑA (Philippines), speaking in explanation of vote, said that although his delegation favoured a higher limit, it had abstained because the question at issue had not been properly clarified. As he saw it, the interpretation of the position given by the United States representative in fact constituted a proposal, and it was that proposal which should have been voted on.

17. Mr. FILIPOVIĆ (Yugoslavia), introducing his proposal to add a sentence to article 6 (4) (A/CONF.152/C.1/L.45), said it was intended to make it clear whether or not the operator's servants or agents would be bound by an agreement on the part of the operator to increase the limits of liability as provided for under that paragraph. All existing transport conventions made provision for operators to make such an agreement by means of a special declaration. While it already seemed clear that the operator's servants and agents would be bound by such an agreement, it was less clear whether it would also be binding upon independent contractors. The issue was an important one, and should not simply be left to the courts in the various States to interpret.

18. The CHAIRMAN suggested that it would be more appropriate to include the sentence in article 7 (2).

19. Ms. JØRGENSEN (Denmark) supported the proposal, and agreed that it would be better placed in article 7 (2).

20. Mr. CHRISTOV (Bulgaria) remarked that the Yugoslav proposal had no legal foundation, as the relationship between the operator and his servants or agents or other persons was res inter alios acta.

21. Mr. LAVIÑA (Philippines) thought that the proposed text was self-evident and could be added to article 6 (4) without modifying its legal effect. He was not in favour of putting it in article 7 (2).

22. Mr. SWEENEY (United States of America) agreed that the appropriate place for the Yugoslav proposal was in article 7 rather than article 6. With regard to the substance of the proposal, it was self-evident in so far as it concerned the

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(Mr. Sweeney, United States of America)

operator's servants or agents, but he would endorse the Bulgarian representative's view that a legal problem arose in connection with the "other persons" referred to.

23. Mr. BONELL (Italy) said that he failed to see how the operator's servants or agents or other persons involved in the performance of the transport-related services could be bound by a contractual provision agreed upon between the operator and the customer.

24. Mr. RUSTAND (Sweden) said that he saw no difficulty in accepting the Yugoslav proposal, which he considered to be a logical counterpart of the entitlement provided under article 7 (2).

25. Mr. FRANCONI (Instituto Argentino Uruguayo de Derecho Comercial), speaking at the invitation of the Chairman, said that under Argentine law an agreement concluded between the operator and the customer would apply to the operator's servants or agents, but not to other persons such as contractors or subcontractors.

26. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that he favoured the principle incorporated in the Yugoslav proposal and would have no objection to its being added to article 6 (4), although he agreed that article 7 (2) would be a more appropriate place.

27. Mr. ABASCAL (Mexico) pointed out that the limits of liability referred to in article 7 were those provided for in the Convention, while the Yugoslav proposal was concerned with limits of liability agreed between the operator and the customer. In his view, the latter were binding upon the operator alone and could not be extended to his servants or agents or other persons of whose services he made use for the performance of the transport-related services.

28. Mr. WEISER (International Union of Marine Insurance), speaking at the invitation of the Chairman, said that he shared the concern expressed by a number of delegations with regard to the position of independent contractors. From the insurance point of view, the provision might create severe problems for the independent contractor as regards insurance cover for his liability, the extent of which might not even be known to him.

29. Mr. FILIPOVIĆ (Yugoslavia) said that he would have no objection to his proposal being incorporated in article 7. With regard to other points raised during the discussion, he said that there was no possibility of the contractor being unaware of the extent of liability he might incur, as the precise value of the goods would be stated in the consignment notes and other documents. With regard to the question of insurance, he drew attention to article 6 (4) of the Hamburg Rules, which spoke of an agreement between the carrier and the shipper increasing the carrier's limit of liability.

30. Ms. SISULA-TULOKAS (Finland) said that her delegation would have difficulty in accepting the Yugoslav proposal in so far as it affected independent contractors. She referred in that connection to article 10 (3) of the Hamburg Rules, which provided that any special agreement under which the carrier assumed obligations not imposed by the Convention affected the actual carrier only if agreed to by him expressly and in writing.

31. Mr. ZHAO Chengbi (China) pointed out that whereas the main object of article 7 (2) was to protect the interests of the operator's servants or agents or other persons of whose services he made use for the performance of the transport-related services, that of the Yugoslav proposal was to protect the

(Mr. Zhao Chengbi, China)

interests of the customer. For that reason, he would be opposed to including the proposal in article 7. He agreed with previous speakers that an agreement concluded by the operator could not be automatically applicable to the "other persons" referred to in the text.

32. Mr. CHRISTOV (Bulgaria) said that the provision proposed by the Yugoslav delegation would have no legal value unless the servants, agents or other persons referred to were informed of the terms of the agreement between the operator and the customer.

33. Mr. NAOR (Israel) said that a distinction should be drawn between the limits of liability that were compulsory under the Convention and those agreed upon separately between the operator and the customer. The Convention should deal only with the compulsory limits and leave the question of those arranged by separate agreement to the parties to that agreement.

34. Mr. ILLESCAS (Spain) remarked that the Yugoslav proposal was couched in more mandatory terms than article 7 (2). For his part, he would prefer to maintain the non-imperative, discretionary character of the present wording of article 7 (2). However, at least part of the Yugoslav delegation's concerns might be met by adding the words "and the contract" at the end of article 7 (2).

35. Mr. LEBEDEV (Union of Soviet Socialist Republics) suggested that, in view of the substantial differences of view which had emerged during the debate, a separate vote should be taken on the question whether the higher limits of liability agreed to by the operator applied also to the operator's servants or agents, on the one hand, or to his servants or agents or other persons of whose services he made use for the performance of the transport-related services, on the other. With regard to the applicability of the higher limits of liability agreed to by the operator to the operator's servants or agents, he noted that no provision of that nature was to be found in the Hamburg Rules or in earlier international transport conventions. Adoption of the Yugoslav proposal, even without any reference to "other persons", might entail certain consequences with regard to the future interpretation of article 7 (2) of the Hamburg Rules. For that reason, he was inclined to think that it might be preferable not to adopt the proposal.

36. Mr. RUSTAND (Sweden) expressed his delegation's continuing support for the Yugoslav proposal. Unless a contractor or subcontractor was aware of the limits of his liability, he was unlikely to offer his services to the operator.

37. Mr. AL-ZABEN (Saudi Arabia) considered that, although the principle behind the Yugoslav proposal was appropriate, it might impose unnecessary liability on "other persons". The problem could be solved by adding a phrase to the effect that servants, agents or other persons must be made aware of their liability.

38. Mr. BONELL (Italy) said it was clear from its title that the draft Convention dealt with the liability of the operator of a transport terminal in regard to his customer. The only contractor employed by the customer was the operator of the transport terminal, and the present purpose was to establish the basis of and mandatory limits to his liability. The operator could never derogate from the limits of his liability to the detriment of the customer, but could, under article 6 (4), derogate in the customer's favour by agreeing to higher limits of liability. The purpose of article 7 was to avoid all the differences in national legal systems between contractual claims, tortious claims, quasi-contractual

(Mr. Bonell, Italy)

claims, etc., by stating, in paragraph 1, that the the defences and limits of the liability applied irrespective of the nature of the action brought against the operator. The purpose of article 7 (2) was to cover the case in which a servant, agent, or other person such as an independent contractor might be responsible for damage or loss of goods under tortious liability should the customer bring an action against him. In such a case, the servant, agent or other person could avail himself of the same benefits as the operator. However, it would be very surprising, and even illogical from a legal point of view, to say that the operator's contractual agreement to increase his limits of liability also applied to other persons. It was not enough to assert that such other persons must be made aware of the increased limits of liability; they must accept such a clause before it could be invoked against them. Nothing was said in the Hamburg Rules about such an automatic extension of liability. In article 10 (3), the "actual carrier" was bound by any special agreement between the carrier and the customer only if he so agreed expressly and in writing. In short, it was almost impossible to accept a proposal such as that submitted by Yugoslavia because the law did not allow contractual provisions to be extended to third parties.

39. Mr. FILIPOVIĆ (Yugoslavia) said that the aim of his proposal was to bring the matter under discussion, since the Convention covered not only the servants and agents of the operator of a transport terminal, but also other persons, such as independent contractors, used by him and bound to him in a business relationship. It would be quite possible for the Conference to fix limits, as in article 6 (1) (a), with respect to such persons, or to delete article 6 (4). It was up to the Conference to decide.

40. After a procedural discussion in which Mr. SWEENEY (United States of America), Mr. LEBEDEV (Union of Soviet Socialist Republics), Mr. BONELL (Italy), Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic), Mr. RUSTAND (Sweden) and the CHAIRMAN took part, the CHAIRMAN invited the Committee to proceed to an indicative vote on the following three questions:

(a) Should higher limits of liability agreed to by the operator apply only to the said operator?

(b) Should higher limits of liability agreed to by the operator apply also to the operator's servants and agents?

(c) Should higher limits of liability agreed to by the operator apply also to the operator's servants and agents and to other persons of whose services the operator made use?

41. After the indicative vote, the CHAIRMAN announced that 20 delegations had voted in favour of question (a), 13 in favour of question (b), and 3 in favour of question (c).

42. Mr. FILIPOVIĆ (Yugoslavia) said that the vote showed that his delegation had been right to relate its proposal to article 6 (4), because it had become apparent that it gave rise to differences of interpretation, which the Conference was in a position to eliminate. In some legal systems only the operator would be concerned, in others it would be the operator and his servants and agents, and in still others it would be other persons as well. In his view a positive decision was needed, and he therefore wished his proposal to be put to the vote.

43. The CHAIRMAN said that since the third alternative had received only three votes, the Committee might wish to choose between the other two alternatives.

44. After a procedural discussion in which Mr. FILIPOVIC (Yugoslavia) and Mr. RUSTAND (Sweden) took part, the CHAIRMAN, noting that the Yugoslav representative was no longer pressing his proposal, invited delegations to express their views by means of an indicative vote on whether a contractual commitment of the operator applied also to the operator's servants or agents.

45. After the indicative vote, the CHAIRMAN announced that 16 delegations considered that the commitment did not apply, 15 thought that it did apply and 4 delegations had abstained. In his opinion, the results were not clear enough to enable the plenary to take a decision, which required a two-thirds majority of the participating States present and voting. The Committee could either keep the existing text or leave it to States to adopt the first or second alternative in light of their national legislation.

46. Article 7 (2) gave rise to some difficulty, since it could be interpreted as allowing other persons used to be affected by the operator's contractual commitment. Therefore, he thought that it would be necessary for the Drafting Committee to revise the text in order to show clearly that "other persons" used by the operator would not be affected by a contractual increase in the operator's liability.

47. Mr. CHRISTOV (Bulgaria) said his delegation thought that article 7 (2), was quite clear and in accordance with the Hamburg Rules. He did not think that it required any revision.

48. Mr. RUSTAND (Sweden) thought that it was not appropriate, in view of the results of the indicative vote, for the Committee to refer the text of article 7 (2) to the Drafting Committee. It should be left to States to interpret the provision in the light of their national legal systems.

49. After a procedural discussion in which Mr. LEBEDEV (Union of Soviet Socialist Republics), the CHAIRMAN and Mr. BELLO (Philippines) took part, Mr. LARSEN (United States of America) said that he wished to draw attention to his delegation's proposal (A/CONF.152/C.1/L.14), which could provide a solution to the problem facing the Committee by suggesting that the agent should not be affected by an increase in the operator's liability.

50. The CHAIRMAN said that the United States proposal dealt with a different matter from that under discussion at the present time. It would be taken up under article 7.

51. Mr. RAO (India) said that article 7 (2) lent itself to different interpretations. The Committee was drafting a Convention that dealt with the liability of the operator and not that of his agents or servants. Under article 5 it was the operator who was liable for the actions of his agents or servants or other persons of whose services he made use for the performance of the transport-related services. However, under article 7 (2), if the customer proceeded against servants, agents or other persons used by the operator for the performance of the transport-related services, they were entitled to the same defences and limits of liability as the operator. In accordance with article 8 (2), however, when a servant, agent or other person caused damage deliberately, the defences and limits of liability would not apply to him. Article 7 did not deal with the question of the limits of liability when the servant, agent or other person acted beyond the scope of his employment or engagement. The intention appeared to be, and rightly so, that the matter was

(Mr. Rao, India)

something to be regulated by national legislation or in the contract between the operator and the person concerned. In his delegation's opinion, article 6 (4) should be left as it stood and the other aspects should be governed by national legislation.

52. The CHAIRMAN said that if he heard no objection, he would take it that the Committee was in favour of keeping the existing text of article 6 (4).

53. It was so agreed.

The meeting rose at 12.30 p.m.